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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RODOLFO AMADO HILL,

Defendant and Appellant.

H045523

(Santa Clara County

Super. Ct. Nos. F1662557, 216082)

Pursuant to written plea agreements in two separate cases, Rodolfo Amado Hill pleaded no contest to charges of possession for sale of a controlled substance (Health & Saf. Code, § 11378) and being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)).<sup>1</sup> Hill also admitted a prior strike allegation (§§ 667, subds. (b)-(i), 1170.12). After denying Hill's *Romero*<sup>2</sup> motion, the trial court sentenced him to a total term of four years in state prison, consisting of a 32-month term on his conviction for possession of a controlled substance for sale (Health & Saf. Code, § 11378) and a consecutive 16-month term on the charge of being a felon in possession of a firearm.

Appointed counsel filed an opening brief stating the case and the facts but raising no specific issues on appeal. After we reviewed the record under *People v. Wende* (1979) 25 Cal.3d 436, we requested supplemental briefing from the parties on whether the trial court erred in the imposition of fines or fees without first determining whether Hill had

<sup>1</sup> Unspecified statutory references are to the Penal Code.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

an ability to pay. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) [imposition of certain fines and fees without determining defendant’s ability to pay was a violation of due process].)

Having reviewed the parties’ supplemental briefs, we conclude that, in his plea agreements, Hill waived his right to contest certain of the fines and fees imposed, and as to the remaining fines, the record shows that Hill has the ability to pay. We will affirm the judgment.

**I. FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>**

*A. Santa Clara County Case No. F1662557 (Case No. ’2557)*

On October 8, 2016, police officers executed a search warrant for weapons and narcotics at a motel room in Gilroy. Hill and a codefendant were found in possession of approximately 29 grams of methamphetamine, packaging materials, \$538 in cash, and two (empty) handgun holsters. Hill declined to talk to police at the time of his arrest, but later admitted to probation that he had recently started selling drugs because he was trying to “stay afloat.” Hill was “struggling to cope with his addiction” and was having personal and financial difficulties as well.

On May 23, 2017, Hill was charged by information with felony possession of methamphetamine for sale (Health & Saf. Code, § 11378). The information further alleged that Hill had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12).

*B. Santa Clara County Case No. 216082 (Case No. ’6082)*

On June 28, 2017, in a grand jury proceeding, Gilroy police officer Thomas Larkin testified that he reviewed Hill’s Facebook page in January 2017 and saw a post which consisted of a video of Hill firing a handgun at a gun range. Based on the video, Larkin

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<sup>3</sup> As Hill pleaded no contest to the various charges, we derive the facts from the probation report, the transcript of the June 28, 2017 grand jury proceedings, and other documents in the record on appeal.

determined that Hill was also in possession of live ammunition because he could see ammunition casings as they were ejected from the semi-automatic handgun Hill was firing.

Larkin began visiting outdoor gun ranges in the area and, based on the landscape, shrubbery and trees visible in the background of the video, determined that Hill was at the Metcalf Gun Range, “on 101 and Bailey . . . off Malech Road” in San Jose. The video from Hill’s Facebook page was marked as exhibit No. 4 and received into evidence.

A range master for the gun range viewed exhibit No. 4 and identified the location depicted on the video as one of the pistol lanes at his range. The range master estimated that the video of Hill shooting was recorded “less than three years ago,” during the winter, based on his memory of the condition of the backstop and the fact that the grass was green rather than brown. A second range master also watched exhibit No. 4 and estimated that it was shot during the winter of 2016 or 2017.

The grand jury received certified prior conviction packets, which memorialized Hill’s 1997 and 2003 felony convictions, both of which preceded his possession of the handgun he was firing in exhibit No. 4.

On June 28, 2017, the grand jury returned an indictment charging Hill with unlawful possession of a firearm by a felon (§ 29800, subd. (a)(1); count 1), unlawful possession of ammunition (§ 30305, subd. (a)(1); count 2) along with a one-strike sentencing enhancement allegation (§§ 667, subds. (b)-(i), 1170.12).

*C. Plea agreement and sentencing*

On June 29, 2017, the parties reached a universal disposition of Hill’s pending felony and misdemeanor cases. As part of the plea agreement, Hill would be sentenced to a “48 month top” and he would bring a *Romero* motion to dismiss the strike prior enhancement alleged in both of his pending felony cases. Hill initialed and signed an advisement of rights, waiver, and plea form in both Case No. ’2557 and Case No. ’6082.

Paragraph 18 of those forms states that the defendant understands the fines, fees, and costs that may be imposed, including certain mandatory fines and fees, and others depending upon the ability to pay. The paragraph concludes with the statement “and I do not contest my ability to pay these fines and fees.”

Accordingly, Hill pleaded no contest in Case No. '2557 to possession for sale of methamphetamine (Health & Saf. Code, § 11378) and admitted the strike prior allegation (§§ 667, subds. (b)-(i), 1170.12). Hill also pleaded no contest in Case No. '6082 to unlawful possession of a firearm by a felon (§ 29800, subd. (a)(1)) and admitted the strike prior allegation (§§ 667, subds. (b)-(i), 1170.12). In exchange for his plea, the charge of unlawful possession of ammunition (§ 30305, subd. (a)(1)) in Case No. '6082 as well as misdemeanors in two other cases<sup>4</sup> were to be dismissed. At a separate hearing on October 27, 2017, the trial court denied Hill's *Romero* motions in Case Nos. '2557 and '6082.

On January 19, 2018, Hill was sentenced to a total term of four years in state prison, consisting of 32 months (lower term of 16 months doubled due to the strike prior) on the charge of possession of methamphetamine for sale (Health & Saf. Code, § 11378, Case No. '2557) and a consecutive sentence of 16 months (one-third the middle term of four years) in state prison for possession of a firearm by a felon (§ 29800, subd. (a)(1), Case No. '6082). The charge of unlawful possession of ammunition was dismissed. Hill was awarded total credits of 613 days, consisting of 307 days of custody credits plus 306 days of conduct credits under section 4019.

In Case No. '2557, the trial court imposed a restitution fine of \$600, plus an additional parole revocation fine (suspended) of \$600 (§§ 1202.4, subd. (b)(2), 1202.45). The court further imposed a \$50 crime lab fee plus a \$155 penalty assessment (Health &

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<sup>4</sup> Santa Clara County case Nos. F1661440 and F1763906.

Saf. Code, § 11372.5, subd. (a)), a \$150<sup>5</sup> drug program fee plus \$465 in penalty assessments (Health & Saf. Code, § 11372.7, subd. (a)), a \$40 court operations assessment (§ 1465.8), a \$30 criminal conviction assessment (Gov. Code, § 70373), and a \$129.75 criminal justice administration fee (Gov. Code, §§ 29550, 29550.1, 29550.2).

In Case No. '6082, the trial court imposed a restitution fine of \$300, plus an additional parole revocation fine (suspended) of \$300 (§§ 1202.4, subd. (b)(2), 1202.45). The court further imposed a \$40 court operations assessment (§ 1465.8), a \$30 criminal conviction assessment (Gov. Code, § 70373), and a \$129.75 criminal justice administration fee (Gov. Code, §§ 29550, 29550.1, 29550.2).

Hill did not object to the fines and fees at the sentencing hearing.

## **II. DISCUSSION**

In the supplemental briefing, Hill argues that the trial court erred by imposing any fines and fees without first conducting an ability to pay hearing as required by *Dueñas*, *supra*, 30 Cal.App.5th 1157. Hill further contends that his failure to raise this issue below does not amount to forfeiture because *Dueñas* “represents a significant post-sentencing change in both the law and in the procedure courts are required to undertake” in imposing fines, fees and assessments. Hill acknowledges he initialed the paragraphs in his plea agreements giving up his right to contest the ability to pay fines and fees but argues this cannot amount to a waiver of the “new rights” announced in *Dueñas*.

The Attorney General’s supplemental brief notes that, as part of his plea agreements, Hill expressly agreed not to challenge his ability to pay the fines and fees imposed by the court at sentencing. Alternatively, the Attorney General argues that

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<sup>5</sup> At the sentencing hearing, the trial judge said the drug program fee was “\$155.” Presumably, the trial judge misspoke or the figure was mistranscribed since Health and Safety Code section 11372.7, subdivision (a) expressly limits the drug program fee to “an amount not to exceed one hundred fifty dollars.”

Hill's failure to object to the imposition of fines and fees below means that he has forfeited that claim on appeal, urging this court to follow the rationale of *People v. Frandsen* (2019) 33 Cal.App.5th 1126. Finally, the Attorney General contends that any error in imposing fines and fees on Hill was harmless because there is sufficient evidence in the record to show that Hill had the ability to pay.

We conclude that, pursuant to his plea agreements, Hill expressly waived his right to contest certain of the fines and fees imposed at sentencing, but the language of the plea agreement form does not extend to the restitution and parole revocation fines. As to those fines, however, the record shows that Hill has the ability to pay.

*A. Plea agreements*

Paragraph 18 of the plea agreements in both Case No. '2557 and Case No. '6082 provides as follows: "I understand: I will be ordered to pay fines, fees, and costs, which may include: A general fund fine of up to \$10,000 (plus over 310% in penalty assessment); a mandatory restitution fine of not less than \$300 and not more than \$10,000 (plus a 10% county assessment); a probation or parole revocation fine equal to the imposed restitution fine; a court operation assessment of \$40 per count; a criminal conviction assessment of \$30 per count; a drug analysis fee of \$50 for each separate drug/DUI offense (plus over 310% in penalty assessment); a sex offense fine of up to \$500 (plus over 310% in penalty assessment); and a fine of \$10 for theft offenses and vandalism.<sup>[6]</sup> If I am pleading guilty or no contest to the offense of Health & Safety Code

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<sup>6</sup> We suggest that the County of Santa Clara amend its advisement of rights form to include citations to the specific statutes underlying each of the fines, fees, and costs described in this paragraph. For example, we were unable to locate a statute authorizing a "fine of \$10 for theft offenses and vandalism" unless this is a reference to section 1202.5, also known as the crime prevention fund fine. Given that the third sentence of this paragraph also advises that the defendant may be required to pay "crime prevention fund fine of \$10," it appears that there is some overlap between the first and third sentences. Citations to the applicable statutes would clarify the matter greatly, as (continued)

section 11350, a fine of \$1000 (plus over 310% in penalty assessment) or uncompensated community service will be imposed. Depending on my ability to pay, I may also be required to pay a crime prevention fund fine of \$10 (plus over 310% in penalty assessment); a \$4 emergency medical air transportation penalty for each vehicle code violation; an AIDS education fund fine of \$70 (plus over 310% in penalty assessment); a drug program fee not to exceed \$150 for each separate drug offense (plus over 310% in penalty assessment); a criminal justice administration fee of up to \$259.50; a probation supervision fee (up to \$110 a month); and court appointed attorney's fees; and I do not contest my ability to pay these fines and fees." Hill initialed this paragraph in both cases.

At first glance, the language of this paragraph seems to support the Attorney General's position that Hill waived his right to contest all of the fines and fees imposed. A closer reading, however, reveals that the paragraph addresses two different categories of assessments. The first category of assessments is discussed in the first two sentences, and includes the general fund fine, restitution fine, etc. Most of these assessments do not require the court to evaluate the defendant's ability to pay before they are imposed.<sup>7</sup>

The remaining fines and fees in this paragraph are listed in the third sentence, which begins with the phrase, "Depending on my ability to pay . . . ." All but one of the

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well as making it easier for both counsel and the courts to carry out the necessary research.

<sup>7</sup> The statutes which do not require an evaluation of the ability to pay are, as follows: the general fund fine (§ 672); the restitution fine (§ 1202.4, subd. (e) [\$300 minimum fine not subject to ability to pay]); the probation/parole revocation fine (§§ 1202.44, 1202.45); the court operations assessment (§ 1465.8); the criminal conviction assessment (Gov. Code, § 70373); and the drug analysis fee (Health & Saf. Code, § 11372.5). The sex offense fine statute (§ 290.3) requires the court to evaluate ability to pay but only if the issue is timely raised by the defendant. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.) The crime prevention fund fine statute (§ 1202.5), and the drug possession probation fine statute (Health & Saf. Code, § 11350, subd. (c)) do require an ability to pay evaluation, but neither of those fines were imposed in this case.

statutory assessments which follow that introductory phrase provide that the court must evaluate the defendant's ability to pay before they are imposed.<sup>8</sup> The waiver language on which the Attorney General relies—"and I do not contest my ability to pay these fines and fees"—does not stand alone and therefore cannot be read in reference to all of the fines and fees listed in paragraph 18. Rather, it is the concluding phrase of the third sentence and therefore must be read as referring to the fines and fees described in that sentence rather than those listed in the preceding sentences.

Accordingly, when Hill initialed paragraph 18 of the plea agreements below, he expressly waived his right to contest his ability to pay the following assessments: (1) in Case No. '2557, the \$150 drug program fee plus \$465 in penalty assessments (Health & Saf. Code, § 11372.7, subd. (a)), and the \$129.75 criminal justice administration fee (Gov. Code, §§ 29550, 29550.1, 29550.2); and (2) in Case No. '6082, the \$129.75 criminal justice administration fee (Gov. Code, §§ 29550, 29550.1, 29550.2).

This leaves fines and fees totaling \$2,145, consisting of: (1) \$900 in restitution fines (the \$600 minimum fine in Case No. '2557 plus the \$300 minimum fine in Case No. '6082); (2) \$900 in suspended parole revocation fines (again \$600 in Case No. '2557 plus \$300 in Case No. '6082); (3) a \$50 crime lab fee plus a \$155 penalty assessment (Health & Saf. Code, § 11372.5, subd. (a)); (4) \$80 in court operations assessments (\$40 each in Case Nos. '2557 & '6082) (§ 1465.8); and (5) \$60 in criminal conviction assessments (\$30 each in Case Nos. '2557 & '6082). As noted above, these particular

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<sup>8</sup> The exception is the air ambulance fund statute (Gov. Code, § 76000.10, subd. (c)(1)) which does not condition imposition of the penalty on a defendant's ability to pay. However, the remaining statutory assessments—i.e., the crime prevention fund fine (§ 1202.5); the AIDS education fund fine (Health & Saf. Code, §§ 11350, 11377, 11550; Pen. Code, §§ 647, subd. (f), 1463.23 [repealed eff. Jan. 1, 2018]); the drug program fee (§ 1463.13, subds. (d), (e)); the criminal justice administration fee (Gov. Code, §§ 29550, subd. (c), 29550.1, 29550.2); the probation supervision fee (§ 1203.1b); and court appointed attorney's fees (§§ 987.6, 987.81)—all provide for an evaluation of the ability to pay as a precondition to their imposition.



finest and fees are generally *not* subject to an ability to pay finding<sup>9</sup> and no court—prior to *Dueñas*—suggested otherwise. Consequently, the plea agreements in this case did not include an express waiver provision relating to these assessments and we reject the Attorney General’s contention that Hill gave up his right to contest them by initialing paragraph 18.

*B. Hill has the ability to pay*

However, having read and considered the parties’ briefing on *Dueñas* and the question of forfeiture, it is clear that *Dueñas*, even if it were rightly decided, does not apply here because Hill cannot show he was prejudiced by the failure to hold a hearing on ability to pay.

The Court of Appeal in *Dueñas* examined how the “cascading consequences of imposing fines and assessments that a defendant cannot pay” (*Dueñas, supra*, 30 Cal.App.5th at p. 1163) can interfere with an indigent defendant’s fair treatment under the law by in effect punishing the defendant for being poor (*id.* at pp. 1166-1167). The defendant in *Dueñas* had cerebral palsy, was homeless, unemployed and had two children. *Dueñas* began accruing various fines as a teenager for driving with a suspended license and, because of her continued inability to pay these fines, she would repeatedly serve time in jail in lieu of payment, among other adverse consequences. (*Id.* at p. 1161.)

Upon her fourth misdemeanor conviction, *Dueñas* was placed on probation and, at *Dueñas*’s request, the trial court held a hearing on her ability to pay a court operations assessment (§ 1465.8) and criminal conviction assessment (Gov. Code, § 70373), a \$150 restitution fine (§ 1202.4), and previously imposed attorney fees. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1161-1162.) Because it was undisputed *Dueñas* lacked the ability to pay, the trial court waived the attorney fees, but imposed the two assessments and the

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<sup>9</sup> The court must consider ability to pay before imposing a restitution fine in excess of the statutory minimum. (§ 1202.4, subd. (d).)

restitution fine. The court determined that the assessments were statutorily required and, as to the restitution fine, it was prohibited from considering Dueñas's inability to pay as a " 'compelling and extraordinary reason[]' " to waive it. (*Id.* at p. 1163.)

The Court of Appeal reversed, finding that imposing the court operations and criminal conviction assessments without first ascertaining an indigent defendant's ability to pay violates state and federal due process guarantees. (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) The court also directed the trial court to stay execution of the mandatory restitution fine unless and until the People establish the defendant's ability to pay. (*Id.* at p. 1172.)

The harm that caused Dueñas's situation to rise to the level of a constitutional violation was the application of the statutes imposing fines, fees, and assessments, in the face of undisputed evidence that she was unable to pay and would undoubtedly suffer further penalties based *solely* on her indigence. Even assuming Hill may challenge these assessments for the first time on appeal, and further assuming the trial court was required to consider Hill's ability to pay these fees before imposing them, we conclude any error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140 (*Johnson*).)

" '[A]bility to pay' . . . does not require existing employment or cash on hand. Rather, a determination of ability to pay may be made based on the person's *ability to earn* where the person has no physical, mental or emotional impediment which precludes the person from finding and maintaining employment once his or her sentence is completed." (*People v. Staley* (1992) 10 Cal.App.4th 782, 783.) Unlike in *Dueñas*, Hill provides no indication the \$2,145 at issue will saddle him with "anything like the inescapable, government-imposed debt trap" faced by the defendant in that case. (See *Johnson, supra*, 35 Cal.App.5th at p. 139.)

The factual differences between the instant case and *Dueñas* are significant. In contrast to *Dueñas*, Hill did not contest the assessments and fines imposed upon him.

In addition, the record demonstrates that Hill has the ability to pay, as he has earned college credits, was previously employed “as a chemical technician in research and development” and has “work experience . . . in shipping and receiving.” Furthermore, Hill told the probation officer that “[h]e has never been short of employment” and “he has the potential to return to his previous employer or will be assisted in securing employment within his field.” Based on this record, any reasonable court would still have imposed the fees even if it had separately considered Hill’s ability to pay these fees under *Dueñas*.

While Hill was represented by appointed counsel in both the trial court and on appeal, that alone does not demonstrate an inability to pay the assessments or the restitution fine. (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 [“a defendant may lack the ‘ability to pay’ the costs of court-appointed counsel yet have the ‘ability to pay’ a restitution fine”].) There is no evidence indicating that Hill will be subject to additional penalties based upon his inability to pay the assessments and fee. On the contrary, even Hill’s term in prison will afford him the opportunity to earn prison wages, limited as they are. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant’s ability to obtain prison wages].) Because Hill’s case lacks the exceptional circumstances that defined *Dueñas*, we decline to apply its reasoning to the facts before us.

### **III. DISPOSITION**

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Greenwood, P.J.

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Elia, J.